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IN THE

Supreme Court of the United States

October Term, 1957

No. 644

In the Matter of the Petition of
SOOREN ALEXANDER SKENDER,
for Naturalization.

SOOREN ALEXANDER SKENDER,
Petitioner,
against
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sooren Alexander Skender,
Pro Se Petitioner,
% Matthew A. Campbell,
44 Court Street,
Brooklyn, N. Y.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Sooren Alexander Skender, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, entered September 6, 1957.

Opinion Below

The opinion of the Court of Appeals (Appendix A) is reported at 248 F. 2d 92. There was no opinion by the District Court.

Jurisdiction

The judgment of the Court of Appeals decided and entered on September 6, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Original jurisdiction is based on the provisions of Title 8, U. S. C., Section 1421.

Questions Presented

1. Are the provisions of Section 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1426, applicable to the facts in the instant case?

2. Does the mere application for exemption from military service on the ground of alienage, *per se*, debar an alien from citizenship or do the provisions of Section 315 require that such alien also be relieved or discharged from such liability on such grounds before he is permanently debarred from citizenship?

3. Where the records of the Selective Service System show that the alien was not relieved or discharged from liability from training or service because he was an alien, is the alien, nevertheless, forever debarred from citizenship?

4. May the government attorney withhold evidence from the Trial Court if such evidence might be beneficial to the petitioner's case?

Statutes Involved

§ 1426. *Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.*

(a) Notwithstanding the provisions of Section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien. June 27, 1952, c. 477, Title III, ch. 2, § 315, 66 Stat. 242.

SELECTIVE TRAINING AND SERVICE ACT OF 1940

(54 Stat. 885), as amended (55 Stat. 844)

"§ 2. [50 U. S. C. A. App. former §302] Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder."

"§ 3. (a) [50 U. S. C. A. App. former § 303(a)] Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed

for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; * * *."

Statement of the Case

Sooren Alexander Skender, petitioner, an American born in Iraq, arrived in this country as an immigrant for permanent residence on October 3, 1941 and shortly, thereafter, enrolled in classes at the University of Southern California.

During the period that appellant was at this school, this country entered the war. Shortly thereafter, appellant and some other students went to a nearby recruiting center to enlist. Appellant's friends were accepted but he was rejected and informed that he was not eligible to serve in the Armed Forces because, firstly, he was not an American citizen and, secondly, he did not understand the English language sufficiently to qualify for service.

This rejection came as a blow to the appellant. He could not understand why he was not acceptable to the United States merely because he was not born in this country. As time wore on, this hurt grew stronger. He moved to New York because he was no longer happy in California.

Being a boy of only 21 years of age, alone and without someone to properly guide him, emotion took its toll of rea-

son. Unable to rationalize his predicament, when he received the Selective Service Questionnaire he sought the assistance of some people he knew, who resided at Flushing, New York. They persuaded him to go to the Iraqian Consul for advice because they were outraged that he was refused the right to enlist the same as were citizens. The Consul told the appellant that Iraq was a neutral country and that he should stay out of the conflict for the reason that Iraq had been at war with the British, and should Iraq ally itself with Germany, he would be considered a traitor and spy and would be executed if captured.

Having been refused the right to enlist and being advised by the Consul and these friends the appellant requested that he be deferred stating "I am not a citizen of the U. S. A., haven't got rights as a citizen, am bound to my country by law * * * which makes me unable to become a citizen right away" (Exhibit #4).

The Iraq Consul handled all the papers and instructed the appellant to obtain a Selective Service Form D. S. S. 301. On October 31, 1942, appellant obtained said form and was instructed by the Consular officer to sign the application for exemption (Form D. S. S. 301) or risk the danger of being treated as a traitor and spy if captured while serving in the American Army in the event Iraq allied itself to Germany. At no time was he ever informed that to sign this form meant that he would lose his right to become a citizen. On the contrary, appellant was still under the erroneous impression that he was not acceptable as a citizen (A-12a), and as such, was not eligible for the same protective rights afforded American citizens, who were members in the Armed Forces. Being under this erroneous impression, appellant was easily swayed by those who were advising him that he had no alternative but to sign Form D. S. S. 301 for exemption from military serv-

ice. It was these same people that influenced and misled appellant to take an appeal from the local draft board's later action of changing appellant's classification from 4C to 1A.

Iraq became a co-belligerent on January 16, 1943 and nine days later the petitioner was placed in 4-C classification. However, on August 31, 1943 the petitioner was again placed in 1-A classification and was called up for induction. Petitioner appeared at the induction center for a physical examination preparatory to his induction into service. The physical examination revealed that the petitioner had a congenital heart condition and he was, therefore, rejected for service and placed in 4-F classification as physically unfit for service.

In 1947 appellant applied for naturalization. His petition was finally placed on the Court Calendar with a recommendation that it be denied under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426. There was no naturalization hearing held by the Immigration and Naturalization Service.

On January 30, 1956 Hon. John M. Cashin denied the petition upon the recommendation of the Naturalization Examiner. Appeal was taken to the Circuit Court of Appeals for the Second Circuit. This petition is made from that Court's decision.

Reasons for Granting the Writ

(1) Whether the provisions of Section 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426 or the provisions of Section 3(a) of the Selective Service Training Act of 1940 (54 Stat. 885) as amended (55 Stat. 884), 50 U. S. C. A. Appendix Section 303(a), are applicable in a case where a petition for naturalization is heard under

the provisions of the Immigration and Nationality Act of 1952, has created a serious question with the Courts as well as the Immigration and Naturalization Service.

That this question has not been resolved is clear from the fact that here the Government presented its case initially in the Trial Court on the theory that Section 315 of the Immigration and Nationality Act was applicable. Yet, in its brief before the Appellate Court, the Government contended that the provisions of Section 3(a) of the Selective Service Training Act of 1940, 50 U. S. C. A. Appendix Section 303(a), were applicable and not Section 315. To support its position in its argument before the Circuit Court of Appeals of the Second Circuit the Government relied on the cases of *Moser* v. *United States*, 341 U. S. 41 (1951); *Machado* v. *McGrath*, 193 F. 2d 706 (D. C. Cir. 1951), cert. denied, 342 U. S. 948 (1952); *Ceballos* v. *Shaughnessy*, 352 U. S. 599 (1957), affirming 229 F. 2d 592 (2d Cir. 1956); *Ballester Pons* v. *United States*, 220 F. 2d 399 (1st Cir. 1955), cert. denied, 350 U. S. 830 (1955). With the exception of *Ceballos* v. *Shaughnessy*, none of the above cited cases make any reference to the provisions of Section 315 of the Immigration and Nationality Act of 1952. In the *Ceballos* case the applicability of Section 315 was raised, however, this Court did not answer the question, since in the opinion of Justice Brennan, Section 315 of the Immigration and Nationality Act was not applicable to the facts in that case because it involved a suspension of deportation. As a result of the confusion as to what statute should apply, some aliens have been granted certificates of naturalization while other aliens, under like circumstances, have been denied naturalization.

(2) The mere appication for exemptions from military service on the ground of alienage does not in and of itself debar an alien from citizenship (*McGrath* v. *Kristensen* (App. D. C. 1950), 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173; *Moser* v. *United States* (1951), 341 U. S. 41, 71 S. Ct.

553, 95 L. Ed. 729; *United States* v. *Bazan* (C. A., 1955), 228 F. 2d 455, U. S. App. D. C. 108). *Petition of Kutas* (D. C. Cal. 1954), 121 F. Supp. 537.

The provisions of Section 315 require (1) that the alien make application to be exempted or discharged from training or service on the ground that he is an alien and (2) that he be relieved or discharged from such training or service on such ground (*Petition of Mirzoeff*, D. C. S. D. N. Y. June 27, 1956, 143 F. Supp. 177; *Kiviranta* v. *Brownell*, D. C. D. C. May 28, 1956, 141 F. Supp. 435; *Petition of Zumstein*, D. C. S. D. N. Y. 1954, 122 F. Supp. 670; *Petition of Caputo*, D. C. E. D. N. Y. 1954, 118 F. Supp. 870); *Petition of Ailouny* (D. C. Mich. 1948), 77 F. Supp. 327.

The Circuit Court in its opinion (Appendix A) states that it was unable to find any case which defined the impact of Section 315 of the Immigration and Nationality Act of 1952 on a fact-situation such as that which is presented in the instant case. The Court then goes on to use the term *exemption* synonymously with *deferment* or *relief* and ultimately comes to the conclusion that since the petitioner did not serve in the Armed Forces he is to be debarred from citizenship because of the fact that he made application for *exemption* from military service. The Court has failed to take into consideration that the petitioner was relieved from service because of a physical defect (to wit, a congenital heart condition) and that he was not relieved from such training or service upon the ground that he was an alien, which is required by the terms of Section 315 of the Immigration and Nationality Act (Appendix A, p. 17). The Court stated that the fact of relief is determinative of the second prong condition contained in Section 315 of the Immigration and Nationality Act of 1952. However, the Court, nevertheless, concluded that the petitioner had been relieved from service even though he was subsequently ordered to report for induction and would have been inducted but for the fact that he had a physical disability which prevented him from entering military service. Assuming, *arguendo*, that the petitioner was relieved from

service, he was relieved because of his physical condition and not because he made an application to be exempted from service. Moreover, since he was required, under the pain of imprisonment, to report for induction into the armed services after he made application to be exempted therefrom, he was not, therefore, relieved from service.

One need only refer to Section 315 to find that Congress used the term "application for *exemption*" which means relief from an obligation or a duty. Again in subdivision (b) of that Section the terms "* * * whether an alien was relieved or discharged from such liability for training or service because he was an alien". Therefore, it is clear that Congress intended that before an alien could be debarred under this Section he would first have to make application for exemption from training or service upon the ground that he is an alien and further that he be relieved from the liability for such service upon the ground of alienage.

(3) The records show that the petitioner was not relieved or discharged from liability for training or service because he was an alien (Exhibit #2) and since Section 315(b) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426(b) provides that such records are conclusive as to whether the petitioner was relieved or discharged from such liability because he was an alien he is not forever debarred from becoming a citizen of the United States. *Rosio v. Shaughnessy* (S. D. N. Y., 1954), 134 F. Supp. 217; *Petition of Mirzoeff (supra)*.

(4) Fairness and justice require that the government attorney, in presenting a case for the Government at a naturalization hearing, give to the Court all evidence, whether or not such evidence would be beneficial to the Government's case. Moreover, if this evidence is such as to come within the contemplation of a statute, which statute states that such evidence shall be conclusive, the govern-

ment attorney should be required to bring this evidence to the attention of the Court so that the ends of justice should be met. In *re Jow Gin*, C. A. Ill. 1949, 175 F. 2d 299; In *re De Leo*, D. C. Pa. 1948, 75 F. Supp. 896; *Petition of Kelly*, D. C. Or. 1945, 61 F. Supp. 467.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

SOOREN ALEXANDER SKENDER,
Pro Se Petitioner,
c/o MATTHEW A. CAMPBELL,
44 Court Street,
Brooklyn, N. Y.

Appendix

(Opinion of United States Court of Appeals, For the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 371—October Term, 1956

(Argued June 12, 1957 Decided September 6, 1957)

Docket No. 24033

In the Matter of the Petition of SOOREN ALEXANDER SKENDER, for Naturalization.

SOOREN ALEXANDER SKENDER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before:

CLARK, *Chief Judge*, and CHASE and HINCKS,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Cashin, J., which denied a petition for naturalization on the ground that the petitioner was debarred from citizenship under § 315(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. § 1426(a). *Affirmed*.

MATTHEW A. CAMPBELL, Brooklyn, N. Y. (MICHAEL F. GIOSCIA, Brooklyn, N. Y. on the brief), for petitioner-appellant.

HAROLD J. RABY, Asst. United States Attorney for the Southern District of New York, New York, N. Y. (PAUL W. WILLIAMS, United States Attorney, and ROY BABITT, Special Asst. U. S. Attorney, S. D. N. Y., New York, N. Y., on the brief), for respondent-appellee.

HINCKS, *Circuit Judge*:

Appellant, Skender, an Armenian who was a native and national of Iraq, entered the United States for permanent residence on October 3, 1941.

As a male alien, residing in the United States, appellant was subject to registration and military service under the Selective Service Act of 1940, as amended. 50 U. S. C. A. App. Former Sections 302, *et seq.*, 55 Stat. 844.

On August 24, 1942, the appellant, as an alien residing in the United States, filed D. S. S. Form 304 "Alien's Personal History and Statement" with his Selective Service Board, in which he plainly wrote that he could read and write the English language; that he was majoring in mechanical engineering at the University of Southern California; and that his usual occupation was "photography, translation."* In that document, apparently cognizant of the fact that he might be called upon to serve the country whose citizenship he sought and now seeks, he stated that he *did* object to service in the land or naval forces of the United States. That form called his attention to the fact that if he claimed to be a citizen or subject of a neutral country, he could apply for D. S. S. Form 301 "Application by Alien for Relief from Military Service." It was further

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* There was nothing in the record to show that he had served as a translator into or from the English language.

called to his attention that upon execution of such a document he would be relieved from military service but that he would also be debarred from thereafter becoming a citizen of the United States. In forwarding his D. S. S. Form 304 to his Local Board, appellant included a letter in which he requested that the Local Board forward to him D. S. S. Form 301 so that he could make application for relief from military service, indicating that he wished to file D. S. S. Form 301 in connection with D. S. S. Form 304 and thereby obtain exemption from military service.

Thereafter, on October 31, 1942, while Iraq was still a neutral country, appellant filed with his Local Board his application on D. S. S. Form 301 to be exempted from military service. The application was subscribed and sworn to by him before a notary public. It read as follows:

> "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States * * * "

On December 16, 1942, the appellant was classified I-A, but on January 25, 1943, before called for induction, in accordance with his request that he be relieved from military service as a citizen of a neutral country he was formally classified IV-C and his D. S. S. Form 301 was forwarded to Selective Service Headquarters in accordance with regulations.

Meanwhile, on January 16, 1943, Iraq had declared war on the Axis powers. But it was not until June 3, 1943 that Selective Service Regulations took cognizance of that fact. Thereafter, on August 31, 1943, appellant was reclassified I-A, making him subject to immediate induction into the Armed Forces.

On September 8, 1943, appellant wrote a letter to his Local Board in which he stated that he was appealing from the determination reclassifying him from IV-C to I-A, and that the reason for the appeal was his prior filing of a D. S. S. "form 301 exempting myself from military duty. To place me into class I-A at the present time is taking away from me a vested right. I contend that the only way form 301 could be declared invalid is by Congressional Legislation." His appeal was denied and he was continued in Class I-A. After a lapse of a short period he appeared for a preinduction physicial examination in New York City, where it was determined that, for physical reasons, he should be classified IV-F and therefore deferred from military service.

On June 24, 1947, appellant filed his petition for naturalization pursuant to the general provisions of the Nationality Act of 1940.

On January 30, 1956, the petition was brought on for final hearing in the District Court for the Southern District of New York. The Naturalization Examiner recommended to the Court that the petition for naturalization be denied upon the ground that appellant was ineligible for citizenship, by reason of his having applied for and having been relieved from military service in the Armed Forces of the United States as a neutral alien.

At this hearing, appellant admitted under oath that he had applied for relief from military service. He testified that some time after Pearl Harbor with friends in the University of Southern California, where he was then a student in an engineering course, he sought to enlist in the United States armed services but was refused because of his alienage; that after a month or two at the University he was advised to leave because he could not understand English and was making no headway with his studies; that he returned to New York and attended Manhattan College until 1943; that the Iraqian Consul advised him not to serve in the United States Army because otherwise if the Iraqian

government should come under Nazi control and he should be captured, he could be shot as a spy; that it was on the advice and with the assistance of the Iraqian Consul that he requested a Form 301 which he executed and filed without reading; that the Iraqian Military Attache told him to appeal his I-A classification "and as an Iraqian I have to do what he tells me"; and that he didn't understand the language in which his appeal was stated. His testimony was corroborated by no other evidence whatever.

The judge, having heard him testify, concluded that he was "no dummy" and that "he would know what he was doing." The petition for naturalization was denied and this appeal ensued.

The Government's case below was presented on the theory * that it is governed by § 315(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. § 1426(a).** For purposes of this appeal we assume that is so, and that the court could properly withhold naturalization only if the appellant had fulfilled the two-pronged condition of ineligibility for citizenship, *viz.*, that he had applied for ex-

* That theory has support in *United States* v. *Bazan*, D. C. Cir., 228 F. 2d 455; *Pons* v. *United States*, 1 Cir., 220 F. 2d 339; *In re Mirzoeff's Petition*, S. D., N. Y., 143 F. Supp. 177, cert. den. 350 U. S. 830 (*Sic*).

** "§ 1426. Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records

"(a) Notwithstanding the provisions of Section 405(b), of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

"(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien. June 27, 1952, c. 477, Title III, ch. 2, § 315, 66 Stat. 242."

emption from military service on the ground of alienage and had been relieved from such service on that ground.

That the appellant had signed and filed the Form 301, was admitted. Plainly the judge did not believe that he did so without reading the plain legend above his signature advising of the consequences. The case is distinguishable from *Moser* v. *United States*, 341 U. S. 41, where a different form had been used on which to apply for exemption—one which carried no warning that its use would result in debarment from citizenship. Nor did the evidence here compel a finding of a mistake such as led the Supreme Court in the *Moser* case to hold that Moser had not been debarred from citizenship. For here it was fear of the consequences if he should serve (*i.e.*, that he might be shot as a spy), not a mistake as to the effect upon his eligibility for citizenship, which led Skender to apply for exemption. Cf. *Mannerfrid* v. *United States*, 2 Cir., 200 F. 2d 730.

But it is contended for the appellant that the other prong of the condition of ineligibility was not fulfilled because it was not until January 25, 1943, when he was classified IV-C, that the appellant "was relieved * * * from such training * * * " on the ground of alienage. At that time, it is urged, he was not entitled to exemption from service because nine days earlier, when Iraq declared war, he had automatically lost his status as a neutral alien and consequently his statutory right to exemption under § 3(a) of the Selective Training and Service Act of 1940, as amended by the Act of December 20, 1941, 55 Stat. 845. Since he thus was not entitled to exemption at the time when the IV-C classification was made, the exemption from service was void and it was as though he had never been given relief from military service—so the argument runs.

"Although we find no case which has defined the impact of § 315(a) of the Immigration and Nationality Act of 1952 on a fact-situation such as is now before us," we think that the very language of § 315(a) shows that the appellant's

argument is specious. Under the Selective Service System and Regulations, the local boards were charged with the duty of classifying those liable for service. If, on January 15 when Iraq was a neutral nation, Skender's Board had classified him as IV-C, its order would have been in accord with his statutory right of exemption and the resulting relief from service would have completed his debarment from citizenship. The fact that the classification was not made until nine days after Iraq became a co-belligerent, did not make its order void: while the order was outstanding he could not be called for induction and in effect was afforded relief from service. At most, the classification was erroneous and subject to correction.

We hold that he "was relieved * * * from * * * service" within the meaning of § 315(a) of the Immigration and Nationality Act of 1952 and that the two-pronged condition of permanent ineligibility for citizenship was satisfied. There is nothing in the language of that section to suggest that only those legally entitled to be relieved shall be debarred: it is the fact of relief, not the legal right to it, that is determinative of the second prong of the condition. That this is so is suggested by a comparison with § 3(a) of the Selective Service and Training Act of 1940, 55 Stat. 845, which provided that "any citizen * * * of a *neutral* country shall be relieved *from liability* for training or service * * * if * * * he has made application to be relieved *from such liability* * * * " * and that such an application would debar from citizenship. But the bar of § 315(a), although narrower in that it contains a second prong, is broader in that it applies to "any alien" (as contrasted with a neutral alien) who "is relieved * * * from service" as contrasted with "relieved from *liability* for service."

After all, if debarment from citizenship is deemed a just fate for an alien who sought and was accorded an exemption to which he was entitled, it is not unduly harsh for

* Emphasis added.

one who (a) sought an exemption to which he was entitled and (b) was accorded an exemption to which he was *not* entitled. Section 315(a) did not leave it open to the appellant to attack the validity of the very classification which he sought on the ground that when made it gave him an exemption to which he was not entitled. Cf. *Brownell* v. *Rasmussen*, D. C. Cir., 235 F. 2d 527.

The holding of *McGrath* v. *Kristensen*, 340 U. S. 162, is not to the contrary. That case differed from this in that it antedated the Immigration and Nationality Act of 1952 and, more significant, involved an alien who, unlike Skender, because not residing in the United States and quite apart from an alienage exemption, was not under any liability for military service.

Affirmed.